IN THE

Supreme Court of the United States

OCTOBER TERM 1946

No. 1207

BLACK DIAMOND LINES, INC. and TAMPA INTER-OCEAN STEAMSHIP COMPANY,

Petitioners (Respondent-Appellant and Claimant-Appellant below),

against

PIONEER IMPORT CORP.,

Respondent (Libelant-Appellee below).

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE C. SPRAGUE,
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CASES CITED

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Statement *

The question raised in the petition herein is merely one of damages, this Court having previously denied certiorari on the merits, 321 U. S. 766. The Courts below assessed the damages on the well established basis of market value in sound condition at destination, the shipment having been a total loss (*The St. Johns N. F. Ship. Corp.* v. *S. A. Companhia*, 263 U. S. 119, 125, and cases cited therein).

The cause presents no reason within Rule 38, paragraph 5, for the issuance of a writ of certiorari. Contrary to petitioners' assertions neither the decision of the District Court (R. 630-638) reported in 64 F. Supp. 529, nor that of the Circuit Court of Appeals (R. 691-694) reported

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* References are indicated as follows: "R" means Record on damages; "T.R." means Record on merits; "B" means white covered book of exhibits.

in 159 F. (2d) 654, is in conflict with applicable decisions of this Court or of another Circuit. No novel questions of federal law were decided below and questions of local law were not involved. The "questions presented" by the petition, "specifications of error to be urged" and "reasons for granting the writ" are not of general interest or unusual importance; they have already been answered by this Court. In fact, one of the most vital issues raised in the petition herein, namely, that the agreement that the pips were to be covered with tarpaulins, was not part of the contract of carriage because not contained in the bill of lading ("questions presented" 6, 7 and 8 at p. 6 of petition; "specifications of error to be urged" 5, 6, 7 and 8 at p. 8 of petition; and "reasons for granting the writ" 7 and 8 at pp. 10-11 of petition) is merely a repetition of the issue raised in the previous petition on the merits dated December 24, 1943 (No. 570, October Term 1943, denied 321 U. S. 766), to which earlier petition I refer at page 12 "questions" 10, at page 14, "specifications" 8, 9 and 10, and at page 16 "reasons" 7 and 8.

Petitioners seek to make up for the lack of merit of the individual "reasons" ascribed for the issuance of the writ by the multitude of such reasons. Actually this was an ordinary cargo damage case where both Courts below found that petitioners had fundamentally departed from the agreed method of transportation by failing to cover the pips with tarpaulins (R. 634, 692), which under well established authority, including the decision of this Court in *The St. Johns N. F. Ship. Corp.* v. *S. A. Companhia,* 263 U. S. 119, constituted a deviation depriving the petitioners of the protection of their bill of lading limitations. After reaching this conclusion, all questions concerning the validity or invalidity of bill of lading clause 16 and the amount in dollars of the invoice value of the pips became moot. This is why the Circuit Court of Appeals made no finding as to the validity of clause 16 of the bill of lading which the District Court had expressly found invalid (R. 630-633).

The Decisions Below

On the merits the District Court, after trial (49 F. Supp. 559), expressly found that respondent's representatives in Rotterdam on shipping the lily of the valley pips (plant life), refrigeration being unavailable, had booked space on S.S. *Lafcomo* in the next coolest place, namely, on the forward deck of the ship, and had expressly stipulated, on the written loading permit upon which the goods were accepted by the ship and which was the proper place for such a notation, that these pips be covered with tarpaulins (Findings 12, 14, 26, T.R. II, pp. 930-931, 934-935). It also found that petitioners had insufficient tarpaulins available to cover these pips and instructed their stevedores not to cover them (Findings 18-20, T.R. II, 932-933), and that as a result the pips were submerged in sea water for considerable periods of time during the voyage (Finding 30, T.R. II, 936-937) by reason of which they became a total loss for which both petitioners were jointly and severally liable to respondent (Conclusion of Law IX, T.R. II, 946). The Circuit Court of Appeals affirmed (138 F. [2d] 907), stating of the decision of the District Judge that it "leaves little for us to add. There is ample evidence to sustain his findings. Upon the finding that there was no agreement by the shipper that the deck cargo need not be covered, the vessel is liable as well as the common carrier. Salt water is obviously harmful to plant life and the finding of negligence in stowage was justified" (id., p. 908). This Court denied certiorari on the merits (321 U. S. 766).

The cause then went to the Commissioner on damages who after hearing testimony filed a report (R. 607) holding, (1) without discussion or statement of reasons, that "it would appear from a reading of the bill of lading [clause 16] that a choice of freight rates was offered to the shipper and * * * is applicable to the present claim" (R. 611); (2)

that the failure to cover the goods with tarpaulins as agreed upon, although resulting in their destruction, was not a deviation merely because "if * * * the ship had encountered different weather conditions the cargo could have arrived in good condition" (R. 611); (3) that under clause 16 of the bill of lading the shipowner was entitled to limitation to the lowest standard of value (R. 611); that the invoice value of the pips (after careful analysis of the testimony concerning German currency control, free reichsmarks and blocked reichsmarks as well as the finding of the District Court) was $76,973.34 (R. 612-615); (4) that the market value of sound refrigerated pips in New York at time of *Lafcomo's* arrival was $22.50 per thousand, making the total market value for the cargo destroyed the sum of $71,212.50, unless there was a difference in value between refrigerated pips and unrefrigerated pips (R. 616); (5) that unrefrigerated pips were not as valuable as refrigerated pips but were worth 20% less (R. 619). He therefor found libelant's damages to be $56,970 with interest from December 16, 1939, and costs (R. 619).

All parties excepted to the Master's report (R. 620-629). The exceptions were argued before Bondy, D. J., who in an opinion (R. 630-638; 64 F. Supp. 529) sustained libelant's exceptions to the report and held (1) that clause 16 of the bill of lading was invalid because it did not afford a choice of rates for these goods (R. 630-633), citing *Kilthau* v. *International Mercantile Marine Co.,* 245 N. Y. 361, and *The Merauke,* 31 F. (2d) 974; (2) that failure to cover the cargo with tarpaulins was a breach, going to the essence of the contract of affreightment, and constituted a deviation nullifying clause 16 even if otherwise valid (R. 633-635), citing *The Sarnia,* 278 F. 459, cert. den. 258 U. S. 625; *The St. Johns N. F.,* 280 F. 553, aff'd 263 U. S. 119; and (3) that the Commissioner having found that the market value in New York of refrigerated pips was $22.50 per thousand "an amount offered for part of the shipment without differentiation as to grade" erred in discounting that value

by 20% in reliance on the testimony of witnesses who based their opinions on a belief that the pips would have arrived not dormant and in a sprouted condition (R. 636-637). The District Court therefor held respondent was entitled to a decree against petitioner Black Diamond Lines, Inc., for $71,212.50 with interest from December 16, 1939, and costs and against petitioner Tampa Inter-Ocean S.S. Co. for $63,250 with interest from December 16, 1939, and costs, petitioner Tampa Inter-Ocean S.S. Co. to have a decree over against petitioner Black Diamond Lines, Inc., for any amount it paid to respondent thereunder (R. 637). A final decree was entered pursuant to said opinion (R. 639-641).

Petitioners appealed from this decree and the Circuit Court of Appeals modified the decree for respondent by reducing the amount to $56,970 with interest from December 16, 1939, and costs on the ground that the finding of the Commissioner that the market value of unrefrigerated pips in New York on December 16, 1939, was 20% less than that of refrigerated pips was "not clearly erroneous [and] the District Court erred in reversing it" (R. 693). The Court also held that appellants by failing to cover the pips with tarpaulins "deviated fundamentally from the agreed method of transportation. They are therefore deprived of the benefit of the limitation clause. *St. Johns N. F. Shipping Corp.* v. *S. A. Companhia Geral Commercial do Rio de Janeiro,* 263 U. S. 119; *The Sarnia,* 2 Cir., 278 F. 459, cert. den. *Sarnia S.S. Co.* v. *DeVasconcellos,* 258 U. S. 625" (R. 692). *Olivier Straw Goods Corp.* v. *Osaka Shosen Kaisha,* 2 Cir., 47 F. (2d) 878, cert. den. 283 U. S. 856, was also cited (R. 692).

The Circuit Court of Appeals made no holding on the question of the validity or invalidity of clause 16 of the bill of lading; that question was moot in view of its deviation holding. It did, however, hold that "the question of sprouting was foreclosed to appellants before the Commissioner and the District Court below", citing *Gaines* v. *Rugg,* 148 U. S. 228; *Skillern's Ex'rs* v. *May's Ex'rs,* 10

U. S. 267, 6 Cranch 267 (R. 693), because of the finding of the Trial Court that "the pips would not have arrived sprouted had they been covered" (R. 692), which finding was "an integral part of the Court's holding on liability" and had been approved on appeal (R. 693).

In view of this latter holding respondent filed a petition in the Circuit Court of Appeals for rehearing or reconsideration of that part of the opinion which provided for the modification of the final decree against appellants by reducing the principal amount from $71,212.50 with interest and costs to $56,970 with interest and costs (R. 695-699). This motion was based upon the fact that the Commissioner, over respondent's objection that he was foreclosed from so doing, had allowed testimony of petitioners' witnesses that the pips would have been damaged by heating and sprouting if they had not been ruined by sea water. The only testimony of any difference between the market value of refrigerated pips and unrefrigerated pips was given by these witnesses and their cross-examination showed that it was based upon their belief that the pips would necessarily have sprouted or heated if imported unrefrigerated. There was therefore no evidence to sustain the Commissioner's finding on this point which was clearly erroneous and the District Court was right in reversing this finding and its decree should not have been modified. The petition for rehearing was denied (R. 700).

Summary of Argument

All four of the points in petitioners' brief hang upon the first point—deviation. Both Courts below, relying upon well established authority, including the decision of this Court in *St. Johns N. F. Shipping Corp.* v. *S. A. Companhia Geral Commercial do Rio de Janeiro,* 263 U. S. 119, held that petitioners by stowing the "pips" on deck without covering them with tarpaulins "committed a fundamental breach of the contract of shipment" (R. 634), or "deviated

fundamentally from the agreed method of transportation" (R. 692) which deprived them "of the benefit of the limitation clause" in the bill of lading (R. 634, 692). Unless this concurrent holding, based on a long line of authoritative decisions consistently followed for more than a quarter century, is disapproved, then petitioners' second, third and fourth points are moot.

FIRST POINT

The Courts below were clearly right in holding that petitioners "deviated fundamentally from the agreed method of transportation" which deprived them "of the benefit of the limitation clause" in the bill of lading.

(Answering Petitioner's Point I.)

The findings show beyond doubt (1) that petitioners agreed to stow the pips on deck covered with tarpaulins; (2) that they did not so cover them; and (3) that by reason thereof the pips were submerged in seawater and became a total loss (Findings 12, 14, 16, 18, 19, 25, 30, 33, 35, 38, 54; Conclusion VIII; II T.R. pp. 930-945; confirmed on appeal 138 F. [2d] 907).

Petitioners' argument, in this case where the bill of lading was not negotiated and no third parties are involved, that its contractual liability is to be limited to the provisions of the bill of lading is specious and untenable. The oral agreement for tarpaulin coverage was confirmed by the written loading permit which accompanied the pips when they were accepted by petitioners for shipment, and which specifically provided that they were to be covered. Not only did petitioners accept the pips under this loading permit without making any material change in it but in fact required respondent to prepare and deliver a duplicate thereof (Finding 14, II T.R. 931). It would have been normal and usual practice for respondent to deliver the

bill of lading contemporaneously with the loading permit to petitioners and the facts indicate that this is what occurred although there is no evidence either way, petitioners' proposed finding that it was subsequent to the loading permit having been disallowed. The Trial Judge found that the proper place for the notation of tarpaulin coverage was on the loading permit (Finding 26, II T.R. 934) to which petitioners specified error on appeal (II T.R. 951, Nos. 8, 9 and 10) and were overruled on appeal (138 F. (2d) 907). On previous certiorari on the merits (No. 570, Oct. Term 1943) they raised the same issue but their petition was denied (supra, p. 2).

On the appeal below on the damages petitioners again renewed the argument (brief, p. 13) that they were not liable on any agreement contained in the loading permit but not in the bill of lading and hence that there could be no deviation. The Court, unimpressed with this argument, expressly found deviation (R. 692).

The cases cited by petitioners are not in point. No other document besides the bill of lading was involved in *The Delaware,* 14 Wall. 579. In *The Thames,* 14 Wall. 98, the question was whether the original bill of lading in the hands of the shipper or the ship's copy thereof controlled. The cause below did not involve any attempt to contradict or vary a written contract. There were two written documents, the loading permit and the bill of lading. They supplemented rather than contradicted each other since both provided for stowage on deck. The loading permit detailed the type of protection to be afforded the goods when so stowed on deck, by tarpaulins. The Courts below were right in reading both documents together in determining the contract between the parties.

No question of merger is involved. In *St. Johns N. F. Shipping Corp.* v. *S. A. Companhia Geral Commercial do Rio De Janeiro,* 263 U. S. 119, the freight reservation gave the shipowner an option to stow the goods on or under deck; the shipowner later issued a clean bill of lading (importing

stowage under deck) and the Court held it had thereby exercised its option and was guilty of deviation by stowing on deck.

The railroad and express cases cited by petitioners at middle of page 15 of their brief, such as *Davis* v. *Roper Lumber Co.*, 269 U. S. 158; *American Railway Express Company* v. *Levee*, 263 U. S. 19; *Georgia, Florida and Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, are not in point. A doctrine of admiralty law, such as deviation, would have been inapplicable to them and in fact was not even raised.

In *Bank of California N. A.* v. *International Mercantile Marine Co.*, 64 F. (2d) 97, the Circuit Court of Appeals for the Second Circuit, rather reluctantly it would seem, refused to extend the deviation doctrine to a case of unexplained misdelivery of goods by an agent. The case is not in point; nor are those cited at page 15 where claim clauses have been upheld in cases involving unseaworthiness of the vessel or negligence in the care of goods.

There is no particular reason for not allowing a shipowner the benefit of restrictions of liability contained in his contract of carriage where the loss has been due to mere negligence of his servants or the lack of seaworthiness of his ship of which he has had no prior knowledge. There is every reason for not allowing a shipowner the benefit of the restrictions contained in his own contract of carriage where he himself has voluntarily violated the terms thereof in an essential respect, and left the shipowner with unknown risks against which he has not insured. *The Sarnia*, 278 F. 459, cert. den. 258 U. S. 625; *Olivier Straw Goods Corp.* v. *Osaka Shosen Kaisha*, 47 F. (2d) 878, cert. den. 283 U. S. 856; *The St. Johns N. F. Ship. Corp.* v. *S. A Companhia Geral Commercial do Rio De Janeiro*, 263 U. S. 119.

The decision below was clearly within the ruling of this Court in the case last cited where the contract of carriage imported under deck stowage but the shipowner stowed

the goods on deck and in consequence thereof they were jettisoned in a storm. This Court held the shipowner liable without benefit of his bill of lading restrictions in the following words:

> "By stowing the goods on deck the vessel broke her contract, exposed them to greater risk than had been agreed, and thereby directly caused the loss. She accordingly became liable as for a deviation, cannot escape by reason of the relieving clauses inserted in the bill of lading for her benefit, and must account for the value at destination" (p. 124).

The District Court below in the cause at bar, citing the above decision of this Court, said:

> "Had the libellant known that the carrier would not stow the goods on the hatches and cover them with tarpaulins, it might have insured against loss from wetting of the pips instead of only against the loss overboard" (R. 635).

Respondent was not late in raising the "deviation theory". Deviation only became material after the merits had been decided and the matter came before the Commissioner on damages. It was raised as soon as it became material, namely, when appellants began to offer expert testimony concerning blocked marks in their attempt to reduce invoice value. The point was argued orally and by brief before the Commissioner, as well as on exceptions to his report in the District Court and again on appeal in the Circuit Court.

SECOND POINT

The District Court's decision that clause 16 of petitioners' bill of lading was invalid for lack of a choice of rates was correct.

(Answering Petitioners' Point II.)

The Circuit Court of Appeals having found that petitioners "deviated fundamentally from the agreed method of transportation [and] are therefore deprived of the benefit of the limitation clause" (R. 692), found it unnecessary to consider whether such limitation clause was valid or invalid. Had the Court found it necessary to consider the holding of the District Court that this clause was invalid, it would undoubtedly have approved since it was based upon its own decision in a similar case, namely, *The Merauke,* 31 F. (2d) 974, which followed *Kilthau* v. *International Mercantile Marine Co.,* 245 N. Y. 361 (R. 632). Had it disagreed with this holding of the District Court it would most certainly have manifested such disagreement.

The facts clearly show that although clause 16 (R. 631) ostensibly offered a choice of rates none in fact was offered because the value of the shipment did not exceed the bill of lading limit of value.

The pertinent provisions of clause 16 are as follows:

> "the carrier's liability for loss of, or delay, or damage to the goods, shall never exceed: (1) when freight is paid or payable on an ad valorem basis, the value thereof declared in writing * * * and inserted herein; (2) in all other cases, the invoice value or $25. per cubic foot or $50. per 100 lbs. or $250. per package, whichever is least; and it is hereby agreed that the value of the goods does not exceed said amount" (R. 672).

The number of packages in the shipment, their weight in kilos and the number of cubic feet of space occupied by them is shown on the face of the bill of lading (T.R. II, p. 878) from which computations are easily made under the four standards specified in the clause. There were 1,927 packages, weighing 107,180 kilos (235,796 pounds) occupying 9,309 cubic feet of space so that the value of the shipment would have been (1) under the $250 per package limitation, $481,750; (2) under the $50 per 100 pounds limitation, $117,898 and (3) under the $25 per cubic foot limitation, $232,725; whereas (4) the invoice value at point of shipment was $76,973.34 as found independently by the District Court (T.R. II, p. 943, Finding 55) and by the Commissioner (R. 615). It therefore could not be, and was not, disputed that the value of the pips did not exceed invoice value. No value was declared; if it had been declared it would unquestionably have been less than that computed by any of the limitations set in clause 16 except invoice value, as to which it would have been approximately the same. Consequently, there was no valid choice of rates offered, because the value of the goods which were agreed to be carried at the regular tariff rate did not exceed any of the limits specified in the bill of lading. *The Merauke,* supra, and *Kilthau,* supra, cases are therefore controlling.

Petitioners' contention (brief, p. 18), citing *People of Illinois* v. *Campbell,* 91 L. Ed. 272, that respondent is estopped from questioning the validity of clause 16 or raising the deviation question after trial, because its counsel requested a final decree for the invoice value of the goods as found and cross assigned error on appeal when its request was denied, is untenable. The District Court (R. 633) pointed this out when the same contention was raised before it on exceptions to the Commissioner's Report:

> "The request was based not upon any admission of fact but upon an erroneous conclusion of law, not binding on any court or on the party by whom made. *Pitcairn* v. *American Refrigerator Transit Co.,* 191 F. 2d 929, 935, cert. den. 308 U. S. 566; *Bierce* v. *Hutchins,* 205 U. S. 340, 347."

THIRD POINT

Assuming but not admitting that the invoice value of the pips is material, then such value is $76,973.34 as found by the Trial Court, affirmed by the Circuit Court of Appeals and found independently by the Commissioner on damages.

(Answering Petitioners' Point III.)

Invoice value of the pips only becomes material in the event (1) that petitioners' failure to cover the shipment with tarpaulins is not a deviation and (2) that clause 16 is valid. Both Courts below held there was a deviation; the District Court also found that clause 16 was invalid though the Circuit Court of Appeals, while affirming with modification found it unnecessary to consider this finding (supra, pp. 5, 11).

Even if invoice value is material the Trial Court in finding 55 determined it as $76,973.34 (T.R. II, 943), which was in effect approved by the Circuit Court of Appeals on the merits when it said of this finding, "All that was determined was the cost price of the pips abroad * * *" (R. 635; cf. 138 F. (2d) 907, 909). The Commissioner on damages independently reached the same conclusion after a careful analysis of the testimony before him including that of the experts on foreign exchange (R. 612-615). In spite of these concurrent findings, and of the probable immateriality of the question, petitioners urge the Court laboriously to re-examine the facts concerning purchase and entry of the goods and the testimony on foreign exchange.

Avoiding detail as much as possible the transaction was as follows: Respondent's entire shipment of 3,165,000 pips was purchased through Eurotank Handels Gesellschaft m.b.H. of Berlin, a German corporation, hereinafter called "Eurotank" (R. 582), payments being made through Reichs-Kredit Gesellschaft Akt of Berlin, hereinafter called

"Bank", half out of respondent's free mark account and half out of a preferential blocked account belonging to respondent's parent corporation, International Mortgage and Investment Corp., hereinafter called "International" (R. 665). This preferential blocked account constituted the proceeds of German mortgages acquired before 1930 by "International" (Ex. 14, R. 657-660). There were seven separately invoiced lots of pips in the shipment and the commercial invoices, consular invoices and debit notes pertaining to each appear in the white book of exhibits referred to as "B" at pages 47 to 73; the custom entries appear in "B" at the pages following 73. The signatures of the officers of "Bank" on the debit notes were verified as genuine by an officer of the National City Bank (R. 74-79). The transaction was approved by permit of German Foreign Exchange Office addressed to "Eurotank", the seller, dated November 15, 1939, entitled "Release of the preferential blocked account of 'International' for the 50% payment for a delivery of 10,000,000 forced lily-of-the-valley germs in a total f.o.b. value of R.M. 600,000" (R. 665-667). The invoices and banking documents show compliance with the conditions contained in this permit. The declarations of respondent filed in the Collector's office at New York substantiate the invoices, debit notes, permit, etc. (R. 658, 663-664).

The experts on foreign exchange testified that the German Foreign Control Act took effect in July, 1931 (R. 383-384) and that thereafter no "auslander", including Germans not living in Germany as well as foreigners, could dispose of funds in Germany that had been acquired prior thereto without a specific license from the Foreign Exchange Office and such accounts became "blocked reichsmark accounts" (R. 386-387, 432-436), but could, however, freely dispose of fresh funds in Germany acquired thereafter, commonly called "free reichsmark accounts" (R. 432-434, 574-580).

The exchange rate of the reichsmark between 1924-1934 was .2381 dollars (R. 388); in 1934 when the United States

went off the gold standard it became .4033 dollars (R. 388), which was the rate proclaimed by the Secretary of the Treasury of the United States effective at the time of the importation in question and upon which the warehouse entries were based (R. 108-112; B, Ex. 27, pp. 77-79, 81, 84-85). The actual exchange rate in the New York market between November 15, 1939, to early December varied from .4010 dollars to .4016 dollars (R. 404).

The categories of German blocked mark credits in effect at the time of the purchase of the pips (November, 1939) are set forth in the Foreign Exchange Law of December 22, 1938, published in the official Reich-Account Gesetzblatt of that date, effective January 1, 1939 (R. 437-438; Ex. 31), under the heading "Sperrguthaben", paragraph 36, Section 1. Of these categories "Vorzugsperrguthaben" ("preferred or preferential blocked credits" colloquially called "altbesitz" or old possession) (R. 438) heads the list as (a). This type of credit had the highest value of any of the categories for use in purchase of merchandise for export (R. 442-445, 468; Ex. 32). This was the type of blocked credit used by respondent under permit of the German Foreign Exchange Office (Ex. 21; R. 665-666) in payment of 50% of the cost price of the pips ("B", Ex. 26, pp. 49, 54, 68, 73), the other 50% being paid in free marks ("B", Ex. 26, pp. 48, 53, 67, 72).

The experts on German foreign exchange control agreed that "Eurotank" who sold these German pips to respondent for export and was paid 50% out of a "vorzugsperrguthaben" account and 50% out of a "free reichsmark" account, received the same type of reichsmarks for the full 100% of the invoice price, all of which were free and without restriction or discount, "the ordinary currency in cash, the currency of the country" (R. 403, 411-413, 448), which it could use without restriction or discount inside Germany for whatever it pleased (453-454). It made no difference to "Eurotank" whether it was paid entirely out of a free reichsmark account or partly out of such an account and partly out of a "vorzugsperrguthaben" account.

The fact that a "vorzugsperrguthaben" account if sold to another "auslander" lost the preferred character which it possessed while in the control of its original holder and became a mere "handelsperrguthaben" credit (R. 414, 445) which could not be used for the purpose of buying goods of German origin for exportation to the United States (R. 445) is immaterial. Respondent did not buy "International's" "vorzugsperrguthaben" account; it obtained the right to use that account because it was "International's" wholly owned subsidiary (R. 414).

Petitioners throughout their brief confuse the issue by treating all types of blocked reichsmark credits as being the same under the colloquial name of "altbesitz mark". The experts on German foreign exchange agreed that there was no such thing as an "altbesitz mark" (R. 415, 440-442) and that respondent's "vorzugsperrguthaben" credit was of much greater value than any of the other types of blocked mark credits (R. 414, 442-443, 466).

Petitioners' entire argument on this point (brief, p. 30) based upon the contention that the reichsmarks paid out of the "vorzugsperrguthaben" account should have been converted at the quotation on handelsperrmarks in November-December, 1939, New York, which it was testified ranged from 2⅞ cents to 3½ cents per mark or an average of $.031875, is clearly fallacious and untenable. Respondent did not buy the "vorzugsperrguthaben" in New York or elsewhere. Moreover, had respondent bought "vorzugsperrguthaben", such credit admittedly would have lost its value by the mere transfer of ownership and could not have been used for the purchase of German pips for exportation to New York (R. 445). Respondent was not required to sacrifice the real value of its "vorzugsperrguthaben" credits by throwing them on the market in New York, stripped of their privileges, when it was in a position to obtain their par value in Germany (where they were located) in exchange for German merchandise for export. The reichsmarks out of respondent's "vorzugsperrguthaben" credit

were actually used at parity for 50% of the purchase price of the pips. The market price of "handelsperrguthaben" in New York is immaterial. The purchase and sale of the pips was purely an inland German transaction, the vendor being a German corporation and the purchase price being paid in German reichsmarks, out of two accounts in a German bank. The cases cited by petitioners are not in point.

FOURTH POINT

The questions presented are not of general interest or great importance. The cause is merely an ordinary cargo damage suit and was decided below in accordance with well established principles previously enunciated by this Court.

FINAL POINT

The petition for writ of certiorari should be denied. If the petition should be granted then respondent begs leave for permission to raise on the argument thereof the question of whether the Circuit Court of Appeals did not err in modifying the decree of the District Court by reducing the damages from $71,212.50 with interest and costs to $56,970 with interest and costs (R. 693-694) and in denying respondent's petition for rehearing on this question (R. 695-700).

Respectfully submitted,

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April 25, 1947.